Dignity or Discrimination:
What paves the road towards equal recognition of same-sex couples in the European Union?

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Abstract

The article analyses possibilities for the Court of Justice of the EU to go beyond its current narrow approach towards same-sex couples' rights within the EU non-discrimination law framework, considering comparative treatment of dignity-based argument and the alternative concept of indirect discrimination. It critically reviews the CJEU's current approach exclusively focusing on direct discrimination and the comparator paradigm. By doing so, the Court has tolerated a situation of de facto discrimination and limited advancement of same-sex rights. The question is then whether the situation could be overcome if the CJEU would follow other courts and develop reasoning based on dignity to underpin the EU non-discrimination analysis with substantive meaning. The article rejects this proposition. Dignity is not suitable because it is both too wide and to narrow to ensure certainty and substantive protection within EU non-discrimination law. While the concept of dignity protects a minimum standard and can provide a floor of rights, non-discrimination law fosters equality by imposing procedural standards and challenging measures that effect groups differently. The concepts should thus not be conflated. Instead, a consistent and application of the concept of direct and indirect discrimination seems to more promising.

Keywords: EU non-discrimination law, equal dignity, same-sex marriage, legal recognition of same-sex relationships

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Introduction

This article explores whether the principle of dignity can help advance the Court of Justice of the EU's (CJEU) approach towards same-sex couples' rights within the EU non-discrimination law framework, considering comparative treatment of dignity-based arguments. Over the last two decades, the rights of homosexuals and other sexual minorities have significantly improved in North America, Western Europe and parts of Africa, South America and Asia. One strand of that development includes the increased legal recognition of same-sex partnerships. Throughout this development, two principal institutions that furthered equal legal recognition can be identified: the courts and the legislators.

Within Western Europe, the legal recognition of same-sex partnerships and subsequent introduction of same-sex marriage was predominantly the result of national political processes with same-sex civil unions and marriage acts eventually being passed by parliament or supported by popular referendum. While the CJEU further advanced the rights to matrimonial benefits of partners in same-sex civil unions, it did so with a sole focus on the concept of direct discrimination (see e.g. *Maruko*, C-267/06 EU:C:2008:179, [2008] ECR I-1757). Similarly, the European Court of Human Rights (ECtHR) in *Karner* (2003, App. No. 40016/98) and subsequent case-law predominantly challenged national practices that differentiate between unmarried same-sex and opposite-sex couples in the same situation. *Hämäläinen* (2014, App. no. 37359/09) confirms that there is no self-standing right to same-sex marriage under the European Convention of Human Rights (ECHR). Only the Austrian Constitution Court has recently decided to review the marriage-law under the constitutional equality principle (pending judgment, E230/2016). The prevailing general picture is thus that of rather impotent or timid courts unable, or unwilling, to push for equal legal recognition of same-sex couples by using or going beyond the current non-discrimination law framework. The scope of legally recognised has thus predominantly been controlled by the national political process

Outside the European context, the US achieved nationwide marriage equality through the courts, although, this development was not completely independent from state legislators. Prior to the US Supreme Court's judgment in *Obergefell v. Hodges* [2015] 135 S. Ct. 2584, 2619 several federal states legislators had already introduced some form of civil union or same-sex marriage. However, these intuitions were often introduced as direct responds to state's constitutional courts challenges of the status quo (Siegel, 2017).Similar developments can be seen in Canada (*Halpern v Canada* [2003] O.J. No. 2268) and South Africa (*Minister of Home Affairs v Fourie* [2006] (1) SA 524). The concept of dignity significantly influenced this development. The implication of this is that dignity can be useful in ensuring equal legal recognition of same-sex couples, alongside the right to equal treatment, equal protection and non-discrimination.

Recognising the limited reach of the CJEU current approach, the article analyses possibilities to challenge de facto discrimination within the EU legal framework going beyond the concept of direct discrimination. In doing so, the article will evaluate the potential of the dignity-centred approach within the context of EU equality law. Hence, the article aims to evaluate whether the CJEU case-laws' limited substantive reach could be remedied by a more detailed engagement with the concept of dignity to provide substantive meaning to the analysis. Ultimately rejecting the usefulness of dignity, the article proposes that a more consistent application of the concept of indirect discrimination could push courts towards legal recognition of rights of same-sex couples.

This article will develop as followed. First, it will consider how dignitaries rights of same-sex couples could become relevant within the scope of EU competences. It will then consider the relationship between dignity and non-discrimination law and same-sex couples rights. Thirdly, the

article will then review whether the concept of dignity could add a layer of substantial value that can advance same-sex couples rights to the current case law of the CJEU. Finally, it will suggest how a clear engagement with the concept of indirect discrimination could achieve similar results without recourse to the principle of dignity. Essentially, the article argues that the concepts of dignity and non-discrimination law address two potentially overlapping fields. While the concept of dignity protects a minimum standard and provides a floor of rights, non-discrimination law fosters equality by imposing procedural standards and challenging measures that disadvantage certain protected groups. The two concepts should thus not be conflated.

Legal recognition of same-sex couples in the EU

As of July 2017, thirteen EU Member States recognise same-sex marriage and an additional nine have introduced another, non-marital civil union for same-sex couples. At EU level, the rights of same-sex couples were only increased significantly once Member States had introduced some sort of same-sex union and the CJEU was able to consider them to be in a 'sufficiently similar' situation to marriage under the scope of direct discrimination (*Maruko* C-267/06 EU:C:2008:179, [2008] ECR I-1757; (Mulder, 2017)). Any review under the concept indirect discrimination that could challenges disadvantages has been rejected (Mulder, 2012).

This can partly be explained with the limits of EU competences. The Charter of Fundamental Rights of the EU (EU Charter) as well as the general principle of non-discrimination only bind Member States if the issue falls within the scope of EU law (*Bartsch* C-427/06 EU:C:2008:517, [2008] ECR I-07245; *Åkerberg Fransson* C-617/10 EU:C:2013:280, 26 February 2013). The lack of competence means that the CJEU is not able to directly challenge a national ban on same-sex marriage because of the principle of dignity or non-discrimination. This is confirmed by secondary legislation. The Framework Directive 2000/78/EC (OJ [2000] L303/16) only prohibits discrimination on grounds of sexual orientation within employment. The introduction of new marital statuses falls outside its scope (recital 22). The CJEU has always been careful to extend the scope of EU competence regarding the rights of same-sex couples. In *Grant* (249/96 EU:C:1998:63, [1998] ECR I-00621), the CJEU rejected that a practices that disadvantaged workers cohabiting with a homosexual partner compared to non-married workers cohabiting with a heterosexual partner constituted pay discrimination based on sex (now Article 157 TFEU). It did so by distinguishing sex from sexuality discrimination (para. 28) and excluding the latter from the scope of EU law (para. 45). Consequently, Ms Grant could not claim a travel concession for her female partner despite the obvious gender dimension of the case and the fundamental status of the sex equality principle (Mulder, 2017, pp. 47-54). Recent cases confirm that the CJEU avoids interfering with the Member States' family law competence. In *Parris* (C-443/15 EU:C:2016:897, 24 November 2016), the CJEU rejected that the Framework Directive allowed a worker to challenge a pension scheme that only provided a survivor pension to the worker's spouse if they got married before the worker's 60th birthday even if he was not able to get married then because same-sex marriage did not exist. Since the Member States are not required to introduce same-sex marriage, present and future disadvantages related to its past inexistence cannot be challenged under the Framework Directive.

Nevertheless, there are good reasons to consider potential inroads of EU non-discrimination. Cases such as *P&S* (C-13/94 EU:C:1996:170, [1996] ECR I-02143) and *Mangold* (C-144/04 EU:C:2005:709, [2005] ECR I-9981) clarify that the equality directives do not establish the equality principle, but rather are a special expression of and give effect to the general principle of equal treatment now also enshrined in Articles 20 EU Charter. Accordingly, the CJEU often adopts a purposive approach towards the interpretation of the equality directives that potentially broadens their personal or material scope. For example, in *P & S* the CJEU subsumed transsexuality

discrimination under the scope of sex and in *Test-Achats* (C-236/09 EU:C:2011:100, [2011] ECR I-773) it challenged an exception that allowed the use of actuarial calculations to justify different insurance rates for men and women because it did not 'contribute, in a coherent manner,' (para. 21) to the 'progressive achievement of equality' (para. 20). There is no reason to believe that the general principle does not include discrimination on grounds of sexual orientation (Lenaerts & Gutman, 2016, p. 848). The suggested purposive interpretation can then encourage the Court to identify new types of disadvantages suffered by same-sex couples. It has been suggested that an engagement with dignity would be helpful here, because it can clarify EU non-discrimination law's normative framework and scope to ensure that it is an effective tool for social change (O'Cinneide, 2015). Lenaerts & Gutman (2016, p. 851) explicitly recognise that the fundamental rights reasoning of the US Supreme Court in *Obergefell v. Hodges* resonates with the EU framework.

Moreover, family reunification rights as well as matrimonial benefits depend on the Member States' recognition of the marriage or civil union concluded in other States. Consequently, married same-sex couples can be seriously deterred from moving to Member States that do not recognise same-sex marriages as they may be stripped of their matrimonial status. This obviously creates an obstacle to the free movement rights of same-sex couples (Tryfonidou, 2015). It is thus highly debated whether civil statuses of same-sex couples should be mutually recognised in all Member States and same-sex married partners fall within the scope of the term 'spouse' under Article 2(2)(a) of the Citizenships Directive 2004/38/EC (OJ [2004] L158/77) (Bell & Selanec, 2016; Bell M. , 2004; Bełavusaŭ, 2017; Bełavusaŭ & Kochenov, 2016/09; Elman, 2000; Guild, Peers, & Tomkin, 2014, pp. 33-43) (Guth, 2011; Titshaw, 2016; Titshaw, 2016; Vaigė, 2012; Weiss, 2007; van den Brink, 2016; Toner, 2004). A preliminary reference raising that question is currently pending at the CJEU (C-673/16 *Coman and Other*). The interpretation of EU secondary law as well as justifications to derogate from free movement rights must comply with the general principles of EU law and the EU Charter. The scope of EU non-discrimination law and its potential for social change can be relevant as it limits the scope of the derogations from free movement rights. Potentially, it could create de facto duties to recognise (foreign) same-sex marriages, even if there is no direct EU duty to introduce such civil status. Neither the CJEU judgment in *Reed* (C-59/85 EU:C:1986:157, [1986] ECR 1283) excluding de-facto cohabitation from the scope of spouse within the meaning of Article 10(1)(a) of Regulation No 1612/96 (old version) nor its judgment in *D and Sweden* (C-122/99 P EU:C:2001:304, [2001] ECR I-4319) distinguishing marriage and civil union with reference to the traditions of the Member States are conclusive on that subject. The judgments do not address the free-movement rights of same-sex spouses. Moreover, the changing attitude towards same-sex marriage may question the clear distinction between same-sex and opposite-sex couples that used to prevail within the Member States (Lenaerts & Gutman, 2016, p. 855). It is thus possible that the Court will recognise the 'serious inconvenience' same-sex couples face once they cross the border and impose a duty on Member States to legally recognise same-sex couples that entered legally binding unions outside that Member State (Lenaerts & Gutman, 2016, p. 857). There are ample opportunities to do so under the Citizenship Directive 2004/28/EC, the Family Reunification Directive 2003/86/EC (OJ [2003] L251/12) and Free movement law (Tryfonidou, 2015; Titshaw, 2016; van den Brink, 2016; Guth, 2011). The question is whether a dignity-focused approach towards non-discrimination law can support such a process or whether a more detailed engagement with the concept of indirect discrimination is more promising.

Dignity and Discrimination

The idea that dignity can help determining the scope of equality is not new. To escape the empty vessel of formal equality (Westen, 1982), recourse to the concept of dignity has been proposed to

identify what differential treatment is legitimate and what is not. Dignity as a foundational value or principle within human rights discourses is clearly visible (Barroso, 2012, pp. 354-358). Many national constitutions and international treaties refer to dignity including Article 1 EU Charter. It is generally suggested that dignity pre-exists, prior to any recognition, and that human rights derive from human dignity (Grant, 2007, p. 305). However, dignity itself is difficult to define and can include many different philosophical positions dependent on the political and geographic environment (O'Connell, 2008, pp. 271-274; Barroso, 2012, p. 391). In the Kantian understanding, dignity is the idea of humans 'an unconditioned, incomparable worth' (Kant, 2002, p. 54; Moreau, 2004, p. 294). It recognises everybody's essential 'innate, priceless and indefeasible human worth' (Ackermann, 2000, p. 541) as human being. This certainly seems relevant for equality. If dignity is equal and inherent to all human beings, its respect certainly requires equal treatment before and under the law. The question is whether dignity has any value for non-discrimination law beyond that. Namely, it is questionable whether dignity can underpin the concept of substantive equality in a way that also informs and determine the scope and meaning of non-discrimination law clauses that aim to foster such equality.

Fredman (2011), for example, suggests that dignity can replace 'rationality as a trigger for the equality right' (p. 20) and create 'a substantive underpinning to the equality principle' (p. 21). Dignity then not only identifies suspect criteria that cannot justify differential treatment but also imposes substantive duties and prevents levelling down. It challenges the 'equal misery' defence (Bell M. , 1999, p. 66) or the reduction of standards to ensure that everybody is treated equal. Accordingly, a dignity focused understanding of substantive equality would rather require non-discrimination law to ensure that everybody is treated equally well or at least to a certain minimum standard. Discriminatory nature of marriage that excludes same-sex couples could then not be addressed by simply abolishing marriage all together. After all, that would not help same-sex couples and would worsen the position of opposite-sex couples. Dignity could thus introduce a floor of substantive rights into the non-discrimination law discourse. If one accepts that, the question remains what constitutes good, bad or sufficient treatment. This is not at all certain. For example, while access to marriage and matrimonial benefits may be viewed as favourable treatment, marriage has been viewed as a heteronormative and gendered institution that exacerbates inequalities (Barker, 2012).

Dignity can also help to identify unlisted protected characteristics within non-exhaustive list of protected characteristics (Fredman, 2011, p. 22) and to determine whether the different treatment amounts to discrimination contrary to the law. Famously, the South African Constitutional Court focuses on dignity. Accordingly, unfair discrimination means 'treating persons differently in a way which impairs their fundamental dignity' (*Prinsloo v Van den Linde* 1997 (3) Sa 1012 (CC)). Furthermore, in *Harksen v Lane NO* [1998] (1) SA 300 (CC) the court held that distinctions based on unlisted, otherwise rational, characteristics are discriminatory if they 'have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner' (para. 53). Thus, only activities that impair 'equality of dignity' are challenged (Grant, 2007, p. 317). The Canadian Supreme Court seems to take a similar approach in *Corbiere v Canada* [1999] 2 SCR 203. Moreover, the now abandoned test in *Law v Canada* [1999] 1 SCR 497 the court established that it needs to be assessed whether the practice imposed a burden upon or withheld a benefit from the claimant that had 'the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being' (para. 53). Whether this is indeed the case can be subjective and invites further uncertainty into the legal analysis (McCrudden, 2008; O'Connell, 2008).

Moreover, differential treatment that do not violate one's dignity can nevertheless be discriminatory. A dignity-centred approach can thus potentially limit the meaning of substantive equality as it runs the risk of downplaying disadvantages linked to social and economic status (Fudge, 2007, pp. 241-242; Grabham, 2002). For example, the South African Constitutional Court accepted in *President v Hugo* [1997] (4) Sa 1 (CC) that a pardon only given to mothers of young children did not impair the fathers' dignity even though such a measure may be liable to impose or manifest gender roles and stereotypes. The Canadian Supreme Court in *Gosselin v Quebec* [2002] 4 SCR 429 also accepted that the limited right to social security based on age did not amount to discrimination because the distinction did not violate the claimant's dignity. Such an approach sits uncomfortably within a non-discrimination law framework listing specific protected characteristics. Why should a distinction based on sexuality be acceptable simply because the measure is not serious enough to breach someone's dignity? For the EU context, such an approach could also potentially conflate the identification of discrimination and the proportionality review. While Article 21 EU Charter provides a non-exhaustive list of protected characteristics (Kilpatrick, 2014, p. 581), the CJEU reviews the seriousness of the discrimination under the remit of Article 52. Limitations are thus subject to a proportionality test (*Léger* C-528/13 EU:C:2015:288, 29 April 2015, paras 50-51) that can include a review of the seriousness of the limitations. The EU equality directives, on the other hand, provide a closed list of protected characteristics and only allow distinctions directly based on these characteristics within the limits identified in the directives. There seems little space for a dignity-based approach towards non-discrimination within the EU context without potentially reducing the level of protection.

Dignity and the right to recognition

Dignity's focus on recognition may nevertheless be expedient to foster the equal recognition of same-sex relationships. After all, the lack of legal recognition implies the limited or unequal worth of same-sex compared to opposite-sex relationships. The heteronormative ideal reflected in traditional marriage arrangements rejects the worth of homosexual identity and fails to recognise the multitude of sexual relationships and family arrangements that exists. Legal recognition of same-sex relationships thus seems to fall safely within the scope of what Fraser (1995) terms 'cultural injustice' (p. 71), as distinguished from 'socio-economic injustice' (p. 70). In her view, the inequality of sexual minorities is fundamentally rooted in the 'cultural-valuational structure of society' (p. 77) and recognition, even if it often manifests itself through harassment, discrimination and violence and can have socio-economic consequences. Cultural injustice then requires symbolic and cultural acts that revalue traditionally disrespected groups within society and recognises cultural and sexual diversity, while economic justice requires economic restructuring and redistribution, (Fraser, 1995, p. 73). The equal legal recognition of same-sex couples could be such a symbolic act. A dignity-centred approach seems to be helpful here. However, it is questionable whether Fraser's distinction of two abstract categories of oppression sufficiently reflecting how different facets of social inequality and interactions determine each other (Swanson, 2005). Butler (1998) emphasises 'that both "gender" and "sexuality" become part of "material life" not only because of the way in which it serves the sexual division of labour, but also because normative gender serves the reproduction of the normative family' (p. 40). Accordingly, the struggle of sexual minorities 'cannot be understood without an expansion of the "economic" sphere itself to include both the reproduction of goods as well as the social reproduction of persons' (p. 40). The distinction between cultural and economic injustice may thus not be the most useful to capture inequalities suffered by sexual minorities.

The comparative experience with a dignity-centred approach also demonstrates the potentially limited ability of the concept to recognise multifaceted and intertwined disadvantages suffered by

same-sex couples. In *Obergefell v. Hodges* [2015] 135 S. Ct. 2584, the US Supreme Court held that the Fourteenth Amendment's Due Process and Equal Protection Clauses required states to issue same-sex marriage licences and to recognise same-sex marriages licenced in other states. The judgment has been subject of extensive critique and analysis (Kahn, 2015; Porter, 2015; Ewing, forthcoming; Yoshino, 2015; Tribe, 2015). For our purpose, it suffices to say that the majority bases the equal right to marry on the right to equal dignity. Accordingly, the due process' right to liberty includes personal choices central to individual dignity and autonomy including 'intimate choices that define personal identity' (Porter, 2015, p. 334). Justice Kennedy holds, that the right to marry is such a right and demonstrates this by referring to four connected reasons. Firstly, the 'choice to marry is inherent to the concept of individual autonomy' and there is dignity in the bound between two persons 'who seek to marry' (p. 2599). Secondly, marriage 'dignifies couples who wish to define themselves by their commitment to each other' (p. 2600). Thirdly, marriage 'safeguards children and family' by stabilising and dignifying them (p. 2600). Finally, 'marriage is the keystone of our social order' (p. 2601).. Justice Kennedy then continues by connecting the due process clause with the equal protection clause. The exclusion of same-sex couples from marriage means that same-sex couples are 'denied all the benefits afforded to opposite-sex couples and are barred from exercising their fundamental right'. Such exclusion 'serves to disrespect and subordinate' (p. 2604) lesbian and gay couples. The reasoning of the case is thus not only centred around a dignity notion considering equal recognition but also 'liberty-regarding aspects of dignity' (Ewing, forthcoming, p. 20). Not only the access to the institutional, but the apparent dignity-founding and conferring nature of marriage is relevant. This is perhaps best expressed in Justice Kennedy's concluding remarks.

> *No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. […] It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law* (p. 2608).

Such elevation of marriage does not ensure that individuals are protected from 'the spectre of coerced conformity' (Tribe, 2015, p. 30). Nor does it protect or recognise sexual minorities and same-sex couples irrespectively of potential differences. The right to equal access steams form the sameness of all marriages. The judgment has rightly been criticised for uncritically elevating marriage and suggesting that non-married people live a less dignified lifestyle (Markard, 2016, pp. 515-516; Tribe, 2015, p. 31). The judgment certainly does not address the longstanding feminist and queer critique according to which marriage is a heteronormative and gendered institution that does not advance gender equality (Mulder, 2012; Aloni, 2016; Barker, 2012). A dignity-centred approach can thus perpetuate stigmatisation and limit the transformative potential of non-discrimination law.

Heterosexual privileges regarding access to marriage can be challenged without such elevation of marriage. Same-sex couples do not seek dignity by marriage, they challenge the assault on their dignity, as the law denies them equal access (Markard, 2016, p. 537). This also seems to be the approach of the South African Supreme Court in *Minister of Home Affairs v Fourie* [2006] (1) SA 524 (CC). The court rejects the special value of marriage compared to other life-styles and family arrangements that are evolving and deserving of equal respect. It then focuses on past disadvantages suffered by gay and lesbians and the limited choices same-sex couples have regarding their family arrangements (para. 73). The exclusion from marriage is then challenged because it

'failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples' (para. 78). This is a much more nuanced approach (Lau, 2017). However, discriminatory nature of marriage as institution and related matrimonial benefits is not addressed directly. It will be shown below that a non-discrimination law framework can potentially reach further as it capable to recognise structural disadvantages and combine socio-economic and cultural disadvantages.

Can Dignity create certainty within the CJEU's case law?

Within the case law of the CJEU on the legal recognition and equal treatment of same-sex couples the predominant question is that of comparability with opposite-sex marriage. The old cases in *Grant* and *D & Sweden* exposes the difficulty with identifying the right comparator and demonstrates the CJEU's tendency towards formalism (Bell M. , 2012). The choice of comparator seems to be uncertain and fluid (O'Cinneide, 2015); a problem that persists after the introduction of the Framework Directive. In the three key cases that have been decided under the Framework Directive the question of comparability was crucial. *Maruko* (C-267/06 EU:C:2008:179, [2008] ECR I-1757) was the first case that recognised the right of same-sex couples to equal treatment if they are in a sufficiently similar situation. Same sex couples that seek access to matrimonial benefits, need to be in a 'sufficiently similar situation' to married couples. The formal distinction between marriage and civil union is not enough to reject comparability. Rather, a de facto comparison of the specific situation the benefit relates to is necessary, considering the rights and duties conveyed via the specific union in question. In *Römer* (C-147/08 EU:C:2011:286, [2011] ECR I-3591) and *Hay* (C-267/12 EU:C:2013:823, 12 December 2013), the CJEU further clarifies that 'the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned' (*Hay*, para. 33). This means that legal unions with significant differences in terms of rights and obligations may still enable same-sex couples to claim the same rights in some respects if they are in a similar situation considering the specific benefit. Obviously, married same-sex couples have the right to be treated the same as married opposite-sex couples since they entered the same legal institution (see e.g., UK Supreme Court *Walker v Innospec Limited* [2017] UKSC 47). These cases have been duly celebrated as they significantly increase the right of same-sex couples. Their scope nevertheless remains relatively limited (Mulder, 2012). They fail to challenge the heteronormative underpinning of the law on marriage and only recognise the rights of same-sex couples that were legally able and indeed did organise their life like the traditional heterosexual family. It has also been suggested that ultimately, these cases expose the 'uncertainty and contested scope of the equality principle' (O'Cinneide, 2015). The question is then whether a focus on dignity could provide more certainty.

We will review this by reference to cases that fall outside the scope of the Framework Directive. In *Léger* (C-528/13 EU:C:2015:288, 29 April 2015), the CJEU as well as Advocate General Mengozzi identified the French ban on blood donations from men that had homosexual relations to fall under Article 21 EU Charter. However, only Mengozzi engaged in a detailed discussion on the harmful effects of the practice that automatically classified all gay men as high risk but ignored risky heterosexual behaviour. He was thus explicit about the practice's assault on persons' dignity (O'Cinneide, 2015). However, the CJEU also identified the measure to be discriminatory. Its judgment then focuses on the proportionality and necessity of the measure. That can create a robust framework to review the proportionality of discriminatory practices on national level (Dunne, 2015) even if the CJEU too easily accepts that all homosexual men engage in high-risk practices (O'Cinneide, 2015). Dignity provides little guidance on how to address practices that are justified with reference to risk assessments based on statistic evidence. Eventually, the question remains the

same, namely whether the measure necessary and suitable to achieve a legitimate aim. The seriousness of the discriminatory act can be relevant within such a proportionality review. Beyond that, dignity seems to add little, especially since the EU non-discrimination law framework, already recognises the injustice of sexuality discrimination.

Dignity then seems potentially both too wide and too narrow to determine the correct content and scope of non-discrimination law. It is too wide because dignity underpins all human rights. For example, the CJEU case-law on homosexual asylum seekers interpreting Directive 2004/83 (OJ 2004 L304/12) shows a great awareness of the applicants' dignity (O'Cinneide, 2015). This led the court to conclude that applicants cannot be expected to conceal their homosexuality in their home country (*X and Others* C-199/12 EU:C:2013:720, 7 November 2013). The CJEU also rejected practices that are based on stereotypical assumptions regarding homosexual behaviour to establish the applicants' sexual orientation (*A, B and C* C-148/13 EU:C:2014:2406, 2 December 2014). Some of these issues surely relate to equal treatment and the right to equally express the personal sexuality and gender identity. However, it also relates to principles such as the right to personal integrity (Article 2 EU Charter), right to liberty (Article 6 EU Charter) and right to privacy (Article 7 EU Charter). Dignity underpins all these rights. Hence, the challenged practices could be suspect irrespectively of their discriminatory nature. Dignity can be prescriptive. It provides a substantive floor of rights, protect certain minimum standards and bans certain treatment all together. Non-discrimination law does not have the same focus. For example, it would not necessarily be discriminatory if all (same and opposite-sex) civil unions, legal partnerships and marriages were abolished. Dignity on the other hand may prevent the abolishment of marriage.

Dignity also seems too narrow. Not every unequal treatment necessarily amounts to an assault on a person's dignity. While the harmful effect of reinforcing stereotypes can possibly be identified by refence to the concept of dignity, non-discrimination law does not only protect against stereotyping. A focus on dignity obscures the fact that cases of discrimination addresses historic subordination, structural social inequality and socio-economic disadvantages (Moreau, 2004, pp. 296, 320). Moreover, the fact that continental European courts have not challenged the limited legal recognition of same-sex couples under the scope of dignity should make us cautious about the potential of dignity. Certainly, a dignity-focused approach does not force courts to recognise the discriminatory nature of marriage provisions and matrimonial benefits *per se*.

Taking the principle of Non-Discrimination seriously

If a dignity-centred approach is unlikely to advance our substantive understanding of equal treatment and the rights of same-sex couples, the question is whether a focus on non-discrimination can go beyond the current approach of the CJEU. For that, it is useful to focus on the disadvantages experienced by the group with the protected characteristics. They can relate to stereotypes but can also include socio-economic and cultural exclusion.

Dignity's wide encompassing scope is not necessarily able to grapple with these disadvantages. This has much to do with the principle's relationship with autonomy. Personal autonomy as 'ethical element of dignity' refers to the 'free exercise of the will' that entitles individuals to 'pursue the ideals of living well and having a good life in their own ways' (Barroso, 2012, pp. 367-368). There needs to be an equal right to make these choices. However, non-discrimination law goes beyond that. It addresses disadvantages and breaks down barriers. That may increase a person's autonomy as it enables individuals to make choices and enter institutions irrespectively of their protected characteristics. However, it also recognises the context in which these choices have been taken and disadvantages that exist because of or irrespectively of these

choices. There are clear tensions between dignity focusing on autonomy and dignity focusing on disadvantages including cultural and social inequality (O'Connell, 2008, p. 280). For example, in *Robinson v Volks* (2005 (5) BCLR 446 (CC) the South African Supreme Court decided that the succession laws that only entitled married spouses to maintenance paid from their then deceased partners' estate, did not violate the principle of dignity because it was a personal choice to get married. The dissenting opinion also relied on dignity but came to a rather different conclusion, exposing the uncertainty of the concept (O'Connell, 2008, pp. 279-280). The dissent considers that all women suffer disadvantages because of gender inequality and gender roles (*Robinson v Volks*, para 163). Dependencies exist irrespectively of marriage. Accordingly, autonomy can often be more theoretical than real, especially if dependencies make free choices impossible. This means that marital status does not put married women in a different situation compared to other women who also devoted their life to their family, children and partner. The dissent thus fundamentally employs an argument focused on discrimination and disadvantages that is overshadowed by autonomy-focus in the majority judgment. To recognise these disadvantages, we need to go beyond the seeming opposites of 'choices that people have voluntarily made' and 'unchosen features of people's circumstances' (Scheffler, 2003, p. 5; Barry, 2006). After all, it is difficult to distinguish a personal choice and the social context, conditions and circumstances of people's lives when they make these choices (McColgan, 2014, p. 19). Moreover, inequality does not simply stem from circumstance or choice. Rather, it is the result of 'social institutions, their rules and relations, and the decisions others make within them […] institutional organisation, rules, or decisions and the cumulative consequences of each' (Young, 2001, p. 8). Non-discrimination law that tackles some of these disadvantages within social structures can foster substantive equality without recourse to dignity. The concept of indirect discrimination can help with that.

This becomes obvious if we consider the CJEU case-law on same-sex civil unions. As discussed above, to establish a case of direct discrimination, the main question in *Hay, Römer and Maruko* was whether the same-sex couple in the civil union is in a sufficiently similar situation to married couples regarding the specific benefit or advantage in question. It was easy for the CJEU to come to that conclusion in *Maruko* and *Römer*, because in both cases the civil union was exclusively available to same-sex couples while marriage was exclusively available to opposite-sex couples. There was thus a legally created clear link between the sexual orientation of the couple and the legal institution (Mulder, 2017, pp. 54-60). However, *Hay* was somewhat different. The CJEU allowed a comparison of the French civil solidary pact (PACS) with marriage although the PACS is available to same and opposite-sex couples. It considered this difference immaterial because it 'does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage' (para 43). The judgment thus suggests that, if marriage is not open to same-sex couples, civil unions must be treated equally to marriage, 'turning them into *de facto* marriage for the purposes of the workplace' (Finck, 2013). The CJEU does this by focusing on the disadvantage itself not simply the comparability of marriage and the PACS. The exclusion of same-sex PACS from the benefit thus constituted direct sexuality discrimination because only opposite-sex couples could get married and bring themselves under the scope of the benefits. If this is indeed the correct reading of the case, there seems to be an implied assumption that same-sex couples, whether married or not, have the right to some legal recognition and benefits, just like married opposite-sex couples. Exclusion thus constitutes a disadvantage. Non-discrimination law can thus create substantive positive rights of *de facto* recognition if a refusal creates a disadvantage. This approach would also be a continuum of the CJEU judgments in *KB* (C-117/01 EU:C:2004:7, [2004] ECR I-541) and *Richards* (C-423/04 EU:C:2006:25, [2006] ECR I-3585) regarding the right of transsexuals to be recognised in their chosen gender for

the purpose of matrimonial benefits or pension entitlements respectively. In both cases the CJEU accepted that the refusal to recognise the chosen gender prevented the access to the benefit in question and thus constituted a disadvantage (Mulder, 2017, pp. 51-53). In other words, the difference in legal status or situation cannot justify different treatment *per se*.

Outside the scope of similarly situated couples, disadvantages described above can be best addressed by the concept of indirect discrimination. While direct discrimination requires a comparison of similar situations and a different treatment on the grounds of a protected characteristic, Article 2(2)b Framework Directive 2000/78/EC defines indirect discrimination to 'be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular […] sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. While Article 21 EU Charter does not have a similar definition of direct and indirect discrimination, it has been suggested that these concepts are also encompassed within it because of their close connection with status discrimination (Kilpatrick, 2014, p. 693). Regarding sexuality discrimination, Advocate General Mengozzi seems to agree. In *Léger* he considers the ban that excluded men with homosexual relationships from blood donations to constitute indirect discrimination because the exclusion did not cover homosexual women (para. 44). The CJEU did not address the point directly but simply stated that Article 21, just like the Framework Directive, is simply a 'particular expression of the principle of equal treatment, which is a general principle of EU' (para. 48). There is no reason to believe that situations of indirect discrimination are completely excluded from its scope.

Indirect discrimination is concerned with the effect of challenged measure on the different protected groups. In *CHEZ* (C-83/14 EU:C:2015:480, 16 July 2015) the CJEU made clear that it is 'sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage' (para. 96). There is no mention of a requirement that the complainant gives the reason why it has this effect (Fredman, 2016, p. 235). Rather, once the comparable disadvantage is identified the facts speak for themselves to establish a prima facie case of indirect discrimination. The more favourable treatment of married couples will usually constitute a prima facie case of indirect sexuality discrimination if, heterosexual couples are more likely to be married than homosexual couples. This is the case, if no same-sex marriage or civil union is available. However, it is not limited to that situation. It is entirely perceivable that same-sex couples are less likely to enter a heteronormative institution such as marriage. Statistical evidence can provide clarity on that.

It is then up to the defendant to justify the differential treatment with reference to a legitimate aim and the appropriateness and necessity of the measure. Such review would depart from the focus on the apparent free choices made by an individual and instead focus on the disadvantages suffered given the current situation they are in. This does not mean that de facto different treatment of groups with different civil status can never be justified. Article 52(1) EU Charter and the justification included in the definition of indirect discrimination gives them the right explicitly. There may thus still be some differences between Member States regarding their approach towards legal recognition of same-sex relationships and related benefits. However, the judicial evaluation would focus on the issues most relevant: whether benefitting marriage only can be justified given the aims of the provision and the exclusion of same-sex couples from the institutions. It would have to be shown that using the criteria achieves a legitimate aim and is necessary and appropriate. It invites courts to engage in a critical review of benefits linked to marriage. The German Constitutional Court for example has held that it is not a legitimate aim to

benefit marriage *per se*. Rather, considering the specific aim of a matrimonial benefit, it needs to be assessed whether the appropriate group of people can benefit from it. Until now, the court has accepted differences between couples in a legally binding union and those who are simply cohabiting because of the duties of care imposed on partners in such a same-sex union or opposite-sex marriage. However, it has also held that matrimonial benefits cannot be justified because they aim to protect children, considering that not all children's parents are married. The court thus evaluates critically whether the measures indeed achieve the aims (Mulder, 2017, pp. 238-242; Sanders, 2016). Similarly, the South African Constitutional Courts' judgment in *Robinson v Volks* could have considered the purpose of the right to maintenance payments. If it indeed aimed at compensating for dependencies marriage may not be a suitable indicator to identify the correct group. Following this argument, it is not at all implausible to identify situations where different treatment of cohabiting couples cannot be justified, as such a measure does not achieve a legitimate aim (Mulder, 2012). Indirect discrimination could then imply a duty to consider the special situation of same-sex couples that have no access to a legally recognised marriage (see e.g. ECtHR *Taddeucci & McCall* 2016, App. No. 51362/09).

There is thus real potential in the concept of indirect discrimination as it requires de facto legal recognition of the structural disadvantages within society and the similar needs and interests of same and opposite sex couples in different living conditions. Unfortunately, the CJEU has so far refused to engage with the concept of indirect discrimination in the context of same-sex couples' rights. Instead, it excluded disadvantages that are the result of past non-existence of same-sex marriage from the scope of the Framework Directive (*Parris* C-443/15 EU:C:2016:897, 24 November 2016). However, a more formal, step-by-step application of the concept of indirect discrimination would have allowed the Court to reach a different conclusion (AG Kokott *Parris* C-443/15 EU:C:2016:493, 30 June 2016). This assessment continues to be relevant outside the scope of the Framework Directive. Under the scope of indirect discrimination, *Parris* would have required assessing whether an age limit that required a marriage before the age of 60 was an appropriate measure to achieve the aim, namely to avoid so-called death-bed marriages, given that it included a significant minority that were unable to marry despite being in long-term committed relationships (Wintemute, 2017). Other jurisdictions have long assessed these age limits under the scope of indirect discrimination. For example, within Dutch jurisprudence pension schemes that limit or exclude survivor pensions for married couples that have an age gap of more than ten years have been challenged as they do not prevent death-bed marriages but rather reinforce stereotypes about such marriages (Mulder, 2017, pp. 233-236).

Conclusion

The article has discussed the value of dignity to address the differential treatment of same-sex couples within the EU context. Dignity seems attractive. The equality principle does not clearly identify what constitutes a similar situation, or likeness, that requires equal treatment or the recognition of differences. The similar situation test makes it difficult to challenge different treatment of married and unmarried couples and the essentialisation of sexual orientation as distinguished from sex has allowed the CJEU to accept the discrimination of same-sex couples. The dignity principle seems to be able to prevent this as it emphasises everybody's equal worth. Article 1 EU Charter, in recognising the inviolability of dignity, also underlines the concept's importance within any human rights discourse. However, the concept is too wide as well as too narrow to provide substantive meaning for the equality principle as it underpins EU non-discrimination law. It is too wide, because dignity, while upholding the principles of equal individual worth, also refers to issues of liberty/autonomy and community values. As such, it provides a minimum of protection and

rights irrespectively of their discriminatory nature. This includes the question of whether a person's liberty is limited and whether the individual choices made are responsible for the disadvantage. It is too narrow, as it may not identify any discrimination based on a protected ground to constitute an assault on dignity and thus potentially waters down the legal protection. Essentially, dignity and non-discrimination fostering equality focus on two overlapping but separate regulatory fields. While it may not be possible to manipulate the concept of dignity at will (Grant, 2007), for it to become meaningful within a non-discrimination review, related factors, such as stereotyping, perpetuation of oppressive power relationships or the exclusion from basic goods need to be considered (Moreau, The Wrongs of Unequal Treatment, 2004). There is a danger that disadvantages are not considered to be serious enough. Accordingly, dignity cannot be the core concept to determine what differential treatment is legitimate and what circumstances sexual minorities deserve protection from discrimination.

EU law explicitly prohibits sexuality discrimination in Article 21 EU Charter and the Framework Directive 2000/78/EC on discrimination within employment. The EU has no competence to introduce new civil statutes within the Member States. Whether a liberty-based argument that refers to the moral value of marriage as employed by the US Supreme Court is necessary to provide access to marriage for same-sex couples (Ferguson, 2016) is thus not relevant. Apart from that, the concept of non-discrimination can address the disadvantages suffered by same-sex couples who do not have access to marriage and/or non-marital legal unions. The concept of indirect discrimination is useful here as it does not require the disadvantaged group to be in the same situation but rather focuses on the disadvantage. A formal step-by-step application of the concept of indirect discrimination could thus address disadvantages suffered by same-sex couples. It is not evident why dignity should necessarily be determinative of such an assessment.

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